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No. 80-1687

In the Supreme Court of the United States

OCTOBER TERM, 1980

THE WESTERN UNION TELEGRAPH COMPANY,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Did the Court of Appeals err in finding that the Federal Communications Commission's decision to accept a rate filing was unreviewable where a statutory complaint procedure was available to ratepayers aggrieved by the new rates?

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BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

The Federal Communications Commission respectfully asks the Court to deny the petition for a writ of certiorari filed by the Western Union Telegraph Company. Although the Solicitor General agrees that no question warranting further review has been presented, he is filing a separate brief because the Department of Justice had urged the Court of Appeals to reverse the Commission's order under review. The

Commission is represented by its own litigation counsel. 28 U.S.C. § 2348. See *United States* v. *ICC*, 337 U.S. 426 (1949).

OPINIONS BELOW

The January 13 order of the court of appeals (Pet. App. A) and the January 26 amending order (Pet. App. B) are not reported and will not be reported. The opinions and orders of the Federal Communications Commission are reported at 69 FCC 2d 724 (Pet. App. C) and 70 FCC 2d 1294 (Pet. App. D).

STATEMENT

The Commission accepts petitioner's statement as supplemented by the brief in opposition filed by the American Telephone and Telegraph Company (AT&T).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. The petition presents no question that warrants this Court's review. The question of the propriety of the court of appeals' ruling on reviewability is readily resolved under the series of decisions of this Court which strictly limit an appellate court's authority to review agency decisions relating to the acceptance of tariff filings.

A consistent line of cases in tariff review matters establishes that appellate courts have no authority to determine the timing of carrier-initiated rate filings.[1] The court of appeals in this case acted con-

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[1] E.g., *Arrow Trans. Co.* v. *Southern Ry. Co.*, 372 U.S. 658 (1968); *United States* v. *SCRAP*, 412 U.S. 669 (1973); *Atchison, T. & S.F.R. Co.* v. *Wichita B'd of Trade*, 412 U.S. 800 (1973); *Aberdeen & Rockfish R. Co.* v. *SCRAP*, 422 U.S. 289 (1975); *Southern Ry. Co.* v. *Seaboard Allied*

sistently with that line of decisions and, more particularly, with this Court's reasoning in the 1979 *Southern Railway* case. *Southern Railway* held that a decision by the Interstate Commerce Commission not to investigate a tariff revision and thus to allow it to become effective—even in the face of allegations that the rates were patently unlawful—was unreviewable. Its reasoning was that such a decision was committed to the discretion of the agency and that complaint procedures remained available to allegedly aggrieved ratepayers.[2]

Recognizing that it would make little sense to declare orders concerning suspension and investigation unreviewable while permitting review of a related order to accept a rate filing, the D.C. Circuit in *Papago Tribal Utility Authority*[3] extended *Southern Railway* logically to find generally unreviewable an agency refusal to reject a carrier-initiated tariff.[4] And, applying the holding of *Papago*, that circuit has specifically declined tc review an FCC refusal to reject a tariff despite the absence of cost support data sufficient to satisfy the requirements of an agency regulation. *Aeronautical Radio Inc.* v. *FCC*, Nos. 77-1333, *et al.* (D.C. Cir. Nov. 5, 1980) *cert. denied*, 49 U.S.L.W. 3789 (April 20, 1981), 49 U.S.L.W. 3825 (May 4, 1981) (*ARINC*). Unpersuaded by

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Milling Corp., 442 U.S. 444 (1979); *Consolidated Rail Corp.* v. *NARI*, 49 U.S.L.W. 3529, 449 U.S. —— (January 26, 1981).

[2] 442 U.S. at 454-63.

[3] *Papago Tribal Utility Authority* v. *FERC*, 628 F.2d 235 (D.C. Cir.), *cert. denied*, 101 S. Ct. 784 (1980).

[4] *Id.* at 243.

arguments similar to those in the instant petition, this Court denied certiorari in both *Papago* and *ARINC*.[5]

The issue the court of appeals declined to review in the instant case (whether the FCC was obliged to reject because the carrier had not complied literally with threshold filing requirements) is the same issue that was present in both *Papago* and *ARINC*. In contrast to the dispute in *ARINC*, which involved tariff revisions of general applicability and which resulted in a substantial rate increase for a number of customers including the Department of Defense, all that is involved here is a transitory rate disagreement between AT&T and Western Union. And, unlike *ARINC* in which the court of appeals wrote a lengthy opinion, all that is at issue here is a one paragraph, unreported order which has no value as precedent. See D.C. Cir. R.8(f). Thus, this case is far less important than even *ARINC*.[6]

Petitioner accuses the court of appeals of improperly abdicating its judicial authority and asserts that it has made it clear that it will not review the FCC's refusal to reject a tariff filing regardless of the grounds of the decision or the irreparability of the injury (Pet. at 6). That argument overlooks the fact that in both *Papago* and *ARINC*, the D.C. Circuit recognized exceptions to the rule of unreviewability where the agency had disposed finally of a

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[5] See 101 S. Ct. 784 (1980) and 49 U.S.L.W. 3789, 3825 (1981).

[6] The difference in the degree of the importance of the two cases is further illustrated by the fact that although the Solicitor General petitioned actively for certiorari in *ARINC*, he has not done so here.

substantive issue.[7] The unreported order in this case cannot subvert those exceptions.

Petitioner also argues that the statutory complaint remedy is inadequate to redress the injury it has incurred (Pet. at 11). It says that the Commission's refusal to reject the tariff has resulted in "irrevocable shifts in competitive relationships between the two companies" and it speculates that it will suffer a permanent loss of customers (Pet. at 11). However, an easy or certain road to relief is not a prerequisite to a finding of unreviewability under *Arrow Transportation.* As this Court noted in *Southern Railway*, "it was possible in *Arrow* . . . that nonreviewability would leave the aggrieved party without any judicial remedy at all." 442 U.S. at 459 n.12. In this case, Western Union does have the complaint remedy of the Communications Act, 47 U.S.C. §§ 206-209, which on its face does not preclude compensation of the type of injuries envisioned and which "alone suffices to render the FCC order non-final and unreviewable." *Aeronautical Radio, Inc.* v. *FCC, supra,* Nos. 77-1333, *et al.*, separate opinion on petition for rehearing, slip opinion at 4.

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[7] See 628 F.2d at 244-45 and *Aeronautical Radio, Inc.* v. *FCC,* Nos. 77-1333, *et al.* (June 24, 1980), slip opinion as amended on rehearing (November 5, 1980) at 23-25.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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